

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM: [REDACTED]: POSTF-157477-01
[REDACTED]

date:

3/5/02

to:

[REDACTED] Appeals Team Manager

from:

Associate Area Counsel, LM: [REDACTED]

subject:

[REDACTED] Corporation

This responds to your request for advice regarding the proposed Forms 870-AD and 872-A with respect to the final three years of [REDACTED]'s¹ separate existence, preceding its merger with [REDACTED] in [REDACTED]. Our response is provided pursuant to the 10-Day Post Review procedures of CCDM (35)3(19)4(4), as it involves primarily well-settled principles of law. Accordingly, a copy of this memorandum has also been provided to the Office of Chief Counsel for review and comment. We will advise you of their comments as soon as they are received.

Facts

[REDACTED]'s tax years [REDACTED], [REDACTED] and [REDACTED] are currently before Appeals. The statutes of limitations for assessment for all three years have been extended until May 31, [REDACTED]. All issues, other than the impact of [REDACTED]'s investment tax credit ("ITC") claims for tax years [REDACTED] and [REDACTED]², have been resolved. You indicate that it will likely take several year for Exam to fully consider [REDACTED]'s ITC refund claims. As such, the parties have agreed: 1) to execute a Form 870-AD partial agreement for tax years [REDACTED], [REDACTED] and [REDACTED], reflecting the basis of resolution for all items other than those which may be impacted by the [REDACTED], [REDACTED] and [REDACTED] ITC claims; and 2) execute

¹ The tax years in issue include the years ending December 31, [REDACTED] and December 31, [REDACTED], and the merger-shortened tax year ending [REDACTED].

² According to your request, if [REDACTED] prevails on its ITC claims for [REDACTED], [REDACTED], and/or [REDACTED] then its basis in certain depreciable assets will be reduced. If so, [REDACTED]'s reported depreciation deduction for the years at issue will need to be adjusted accordingly.

a Form 872-A restricted consent, extending the statute of limitations for tax years [REDACTED], [REDACTED] and [REDACTED] indefinitely but only with respect to matters impacted by the ITC claims. You have provided us with copies of proposed Forms 872-A and 870-AD for tax years [REDACTED], [REDACTED], and [REDACTED], for our review and comment.

[REDACTED] and [REDACTED] Company, entered into the Agreement and Plan of Merger ("Merger Agreement") on [REDACTED], which outlined the steps by which the two entities proposed to combine. The combination occurred effective [REDACTED] ("Merger Effective Date"), and was accomplished through the use of a holding company and two merger subsidiaries.

The merger was accomplished as follows:

Step 1 [REDACTED] and [REDACTED] formed [REDACTED] Corporation as a holding company under [REDACTED] law on [REDACTED]. According to the Merger Agreement, the initial authorized capital stock of [REDACTED] consisted of [REDACTED] shares of common - [REDACTED] shares of which were issued to [REDACTED] and [REDACTED] shares were issued to [REDACTED]. The Merger Agreement indicates that these shares were to be canceled upon the Merger Effective Date.

Step 2 [REDACTED] incorporated two wholly-owned merger subsidiaries under [REDACTED] law on [REDACTED]. One was known as [REDACTED] Corporation ("[REDACTED]") and the other was known as [REDACTED] Corporation ("[REDACTED]").

Step 3 On the Merger Effective Date, [REDACTED] merged with [REDACTED] and [REDACTED] merged with [REDACTED] and [REDACTED] both continued as the survivors of their respective mergers, with the merger subsidiaries going out of existence. Each share of [REDACTED] common stock issued and outstanding immediately prior to the merger was converted into [REDACTED] share of [REDACTED] common stock. Each share of [REDACTED] common stock issued and outstanding immediately prior to the merger was converted into [REDACTED] share of [REDACTED] common stock.

Step 4 Immediately following the mergers with their merger subsidiaries, [REDACTED] and [REDACTED] were merged into [REDACTED], with [REDACTED] continuing as the surviving entity. Each outstanding share of [REDACTED] common stock, including any [REDACTED] common stock right, was converted into a right to receive a [REDACTED] share of [REDACTED] common stock. Each

outstanding share of [REDACTED] common stock, including any [REDACTED] common stock right, was converted into a right to receive [REDACTED] share of [REDACTED] Common Stock. As of [REDACTED] there were approximately [REDACTED] shares of [REDACTED] Common Stock outstanding and approximately [REDACTED] shares of [REDACTED] Common Stock outstanding. Based on these capitalizations, the merger was expected to result in approximately [REDACTED]% of the common stock equity of [REDACTED] being owned by former [REDACTED] common stock share owners and approximately [REDACTED]% by former [REDACTED] share owners.

Following the merger, [REDACTED] directly held all of the issued and outstanding common stock of [REDACTED]'s direct subsidiaries, which includes (among others) [REDACTED] and [REDACTED], and all of the issued and outstanding [REDACTED] Common stock.

Analysis

Regarding the merger of [REDACTED] and [REDACTED], Article [REDACTED], Sec. [REDACTED] of the Merger Agreement provides, in part:

* * *

(c) the separate existence of [REDACTED] shall cease and [REDACTED] shall be merged with and into [REDACTED] with [REDACTED] continuing as the surviving corporation,

(d) the Merger shall have all the effects of applicable law, including, without limitation Section [REDACTED] of the [REDACTED] General Corporation Law ...

[REDACTED] Revised Code Section [REDACTED] provides, in part, that when a merger becomes effective, [REDACTED]

[REDACTED]

Treasury Regulation Section 1.1502-77(a) provides the general rule that the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. The regulation provides further that the common

parent in its name will give waivers, bonds, execute closing agreements, offers in compromise, and all other documents, and any waiver or bond so given, or agreement, offer in compromise, or any other document so executed, shall be considered as having also been given or executed by each such subsidiary. These provisions apply whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time.

Under Treas. Reg. Sec. 1.1502-77(d), if the common parent of a consolidated group contemplates dissolution, or is about to be dissolved, or if for any other reason its existence is about to terminate, it must notify the district director with whom the consolidated return is filed of such fact and designate another member as agent to act in its place³. If the notice is not given (or not approved), the remaining members can designate another member to act as such agent. We are unaware of any such designation having occurred in the case of the Centerior group. Until a notice in writing designating a new agent has been approved by such district director, any notice of deficiency or other communication mailed to the common parent shall be considered as been properly mailed to the agent of the group. If such district director has reason to believe the existence of the common parent has terminated, he may deal directly with any member in respect of its liability⁴.

Temporary Regulation Section 1.1502-77T(a) provides alternative agents to act for the group when the corporation that is the common parent of the group ceases to be the common parent. Temporary Regulation Section 1.1502-77T(a)(3) provides that a waiver of the statute of limitations with respect to a consolidated group, given by any one or more corporations referred to in subparagraph (a)(4), is deemed to be given by the agent of the group. Temporary Regulation Section 1.1502-77T(a)(4) provides four alternative agents which can act on behalf of the group. The only subparagraph applicable here is Temp. Reg. Sec. 1.1502-77T(a)(4)(ii), which provides that a successor to the former common parent in a transaction in which section 381(a) applies can be an alternative agent. Section 381(a) applies to an acquisition of assets of a corporation by

³ The existence of a corporation is deemed to terminate if it ceases to exist under applicable law. Treas. Reg. Sec. 1.1502-77-(e)(1)(i).

⁴ Each member of the group is severally liable for the entire tax of the group. Treas. Reg. Sec. 1.1502-6(a).

another corporation in a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies. It also applies in a transfer to which section 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraphs (A), (C), (D), (F), or (G) of section 368(a)(1).

The Merger Agreement provides that the merger was conditioned, in part, on both [REDACTED] and [REDACTED] obtaining tax opinions from their respective counsels, which advised that the [REDACTED] merger would be a reorganization within the meaning of section 368(a). Merger Agreement, Article [REDACTED], Secs. [REDACTED] and [REDACTED]. The Recitals portion of the Merger Agreement states, in part, that as to [REDACTED], it was intended that the merger was to be as a tax-free reorganization within the meaning of section 368(a).

[REDACTED] was merged into [REDACTED] under [REDACTED] law, and though the Merger Agreement does not expressly so state, it appears that it qualified as a tax-free merger by way of section 368(a)(1)(A). Thus, pursuant to Temp. Reg. Sec. 1.1502-77T(a)(4)(ii), [REDACTED], as successor to [REDACTED] by tax free merger under section 368(a)(1)(A), qualifies as an alternative agent for purposes of executing the Form 872-A for the [REDACTED] consolidated group for tax years [REDACTED] and [REDACTED].

The alternative agent rules of Temp. Reg. Sec. 1.1502-77T do not apply in the case of Form 870-AD agreements. However, given that under [REDACTED] law [REDACTED] is liable for all of the obligations of [REDACTED], and that the rights of [REDACTED] creditors are preserved unimpaired following the merger, [REDACTED] is the proper party to execute the proposed Form 870-AD, as successor in interest by merger to [REDACTED]. However, [REDACTED] can only sign for [REDACTED]'s liability - not [REDACTED]'s former direct subsidiaries, e.g., [REDACTED] and [REDACTED], which were not merged into [REDACTED]. In the case of the [REDACTED] subsidiaries, the "agent designation" rules of Treas. Reg. Sec. 1.1502-77(d) apply.

Recommendations

1. Form 872-A Caption and E.I.N. The Form 872-A should be captioned "[REDACTED] Corporation (E.I.N.: [REDACTED]), as successor to [REDACTED] Corporation (E.I.N.: [REDACTED]), and as alternative agent for the members of the [REDACTED] Corporation and Subsidiaries group." Put an asterisk (*) after this caption and at the bottom of the Form 872-A type " * This is with respect to the consolidated federal income tax of the

[REDACTED] Corporation (E.I.N.: [REDACTED]) consolidated group for the group's taxable years ending December 31, [REDACTED], December 31, [REDACTED] and the short year ending [REDACTED]."
Place [REDACTED]'s E.I.N. in the E.I.N. box on the Form 872-A.

2. Form 872-A Restricted Language We recommend that you make the following changes to the proposed Form 872-A:

a. The tax years should be identified as "December 31, [REDACTED], December 31, [REDACTED] and the short tax year ending [REDACTED]."

b. Use the following in lieu of the typed language immediately following paragraph 4:

* The amount of any deficiency assessment for tax years ending December 31, [REDACTED], December 31, [REDACTED] and the short tax year ending [REDACTED], is to be limited to that arising from any consequential adjustments required as a result of the investment tax credit refund claims filed in [REDACTED] for taxable years ended December 31, [REDACTED], December 31, [REDACTED] and December 31, [REDACTED]. For purposes of application of the provisions of Section 6511(c) of the Internal Revenue Code of 1986, the refunds or credits which may be claimed under this agreement are limited to those resulting from any adjustments for which the period for assessment is herein extended.

3. Form 870-AD Caption and E.I.N. The Form 870-AD with respect to [REDACTED]'s several liability should be captioned "[REDACTED] Corporation (E.I.N.: [REDACTED]), as successor to [REDACTED] Corporation (E.I.N.: [REDACTED])." Put an asterisk (*) after this caption and at the bottom of the Form 870-AD type " * This is with respect to the several federal income tax liability of the [REDACTED] Corporation (E.I.N.: [REDACTED]) for taxable years ending December 31, [REDACTED], December 31, [REDACTED] and the short year ending [REDACTED]."

With respect to the subsidiaries of [REDACTED] ([REDACTED], [REDACTED], and others) either: 1) they must all designate a member of their old group to act as agent under Treas. Reg. Sec. 1.1502-77(d), which designation must be approved by the Service, and the agreement is executed by the new agent; or 2) each subsidiary must execute its own Form 870-AD with respect to its several liability.

Place [REDACTED]'s E.I.N. in the E.I.N. box on the Form 870-AD for [REDACTED]. Each subsidiary's own E.I.N. should be

CC:LM: [REDACTED] :POSTF-157477-01

page 7

) used on its separate Form 870-AD.

4. Other. We recommend that you confirm the exact names and E.I.N.'s of the taxpayers reflected on the proposed Forms 872-A and 870-AD.

If you have any questions regarding the foregoing, please contact the undersigned at [REDACTED]

[REDACTED]
Associate Area Counsel
(Large and Mid-Size Business)

By: _____

[REDACTED]
Senior Attorney (LMSB)
[REDACTED]